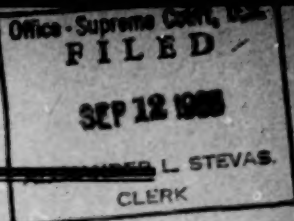


No. 82-912



IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION,
v. *Appellant,*

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.,*
Appellees.

On Appeal from the United States District Court
for the Central District of California

**BRIEF FOR AMICI CURIAE
CBS INC.**

**NATIONAL ASSOCIATION OF BROADCASTERS
RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
IN SUPPORT OF APPELLEES LEAGUE OF WOMEN
VOTERS OF CALIFORNIA ET AL**

Of Counsel:

ALLEN Y. SHAKLAN
HOWARD F. JAECKEL
CBS INC.
51 W. 52 Street
New York, New York 10019

J. ROGER WOLLENBERG
TIMOTHY B. DYK *
ALAN S. TENENBAUM
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for CBS Inc.

ERWIN G. KRASNOW
WILLIAM E. KENNAED
1771 N Street, N.W.
Washington, D.C. 20006

*Counsel for National Association
of Broadcasters*

J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20006

*Counsel for Radio Television
News Directors Association*

* Counsel of Record
September 12, 1983

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. EDITORIALIZING MAKES A VITAL CONTRIBUTION TO THE MARKETPLACE OF IDEAS, AND PROTECTION OF THE RIGHT TO EDITORIALIZE IS ESSENTIAL TO A FREE PRESS	3
II. GOVERNMENT SUPPRESSION OF CONTROVERSIAL SPEECH IS PRESUMPTIVELY UNCONSTITUTIONAL	6
III. THE PROHIBITION ON EDITORIALIZING CANNOT BE JUSTIFIED BY THE SPECIAL CHARACTERISTICS OF PUBLIC BROADCASTING	13
A. The First Amendment Precludes Governmental Interference With the Editorial Freedom of Independent Journalistic Entities Even When They Are Dependent on Government Funding	14
B. The First Amendment Bars Exercise of the Spending Power To Suppress Editorial Speech	19
IV. THE GOVERNMENT HAS NOT ADVANCED ANY COMPELLING INTEREST TO SUPPORT THE SUPPRESSION OF EDITORIALIZING BY PUBLIC STATIONS	23
A. Suppression of Speech of State and Local Governments Is Not a Legitimate Government Interest	23
B. Section 399 Cannot Be Justified on the Ground That It Avoids Taxpayer Subsidization of Unpopular Speech	24

TABLE OF CONTENTS—Continued

	Page
C. Direct Suppression of Public Broadcaster Speech Cannot Be Justified As Designed To Prevent Indirect Efforts To Influence Such Speech	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
<i>Abood v. Detroit Board of Education</i> , 431 U.S. 209 (1977)	26
<i>Accuracy in Media, Inc. v. FCC</i> , 521 F.2d 288 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976)	15, 17
<i>ACLU v. Radford College</i> , 315 F. Supp. 893 (W.D. Va. 1978)	18
<i>Antonelli v. Hammond</i> , 308 F. Supp. 1329 (D. Mass. 1970)	17, 18
<i>Avins v. Rutgers</i> , 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968)	17
<i>Bazaar v. Fortune</i> , 476 F.2d 570 (5th Cir.), aff'd as modified en banc, 489 F.2d 225 (5th Cir. 1973), cert. denied, 416 U.S. 995 (1974)	17, 18
<i>Board of Education v. Pico</i> , 102 S.Ct. 2799 (1982) ..	18, 28
<i>Bolger v. Youngs Drug Products Corp.</i> , 103 S.Ct. 2875 (1983)	6, 12, 21
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	7
<i>Brown v. Hartlage</i> , 456 U.S. 45 (1982)	6, 27
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	21, 23, 26
<i>Carey v. Brown</i> , 447 U.S. 455 (1980)	6
<i>Columbia Broadcasting System v. Democratic National Committee</i> , 412 U.S. 94 (1973)	5, 10, 14
<i>CBS, Inc. v. FCC</i> , 453 U.S. 367 (1981)	10
<i>City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission</i> , 429 U.S. 167 (1976)	7
<i>Community-Service Broadcasting v. FCC</i> , 593 F.2d 1102 (1978)	16, 17, 22, 29
<i>Community Television of Southern California v. Gottfried</i> , 103 S.Ct. 885 (1983)	15
<i>Connick v. Myers</i> , 103 S.Ct. 1684 (1983)	22
<i>Consolidated Edison Co. v. Public Service Commission</i> , 447 U.S. 530 (1980)	6, 8, 12, 21, 23
<i>CSC v. National Association of Letter Carriers</i> , 413 U.S. 548 (1973)	22
<i>Dickey v. Alabama State Board of Education</i> , 273 F. Supp. 613 (M.D. Ala. 1967), vacated, <i>Troy State Univ. v. Dickey</i> , 407 F.2d 515 (5th Cir. 1968)	18

TABLE OF AUTHORITIES—Continued

	Page
<i>EEOC v. Wyoming</i> , 103 S.Ct. 1054 (1983)	24
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	22
<i>Erznoznik v. City of Jacksonville</i> , 422 U.S. 205 (1975)	7
<i>FCC v. Mid-West Video Corp.</i> , 440 U.S. 689 (1979) ..	15, 27
<i>FCC v. National Citizens Commission for Broad- casting</i> , 436 U.S. 775 (1978)	10
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978) ..	10, 11
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982)	24
<i>First National Bank v. Bellotti</i> , 435 U.S. 765 (1978)	7, 12, 23, 24, 25, 26, 30
<i>Frost & Frost Trucking Co. v. Railroad Commis- sion</i> , 271 U.S. 583 (1926)	22
<i>Gambino v. Fairfax City School Board</i> , 429 F. Supp. 731 (E.D. Va. 1977), <i>aff'd</i> , 564 F.2d 157 (4th Cir. 1977)	18
<i>Hodel v. Virginia Surface Mining & Reclamation Ass'n</i> , 452 U.S. 264 (1981)	24
<i>Joyner v. Whiting</i> , 477 F.2d 456 (5th Cir. 1973)	18
<i>Korn v. Elkins</i> , 317 F. Supp. 138 (D. Md. 1970)	18
<i>Landmark Communications v. Virginia</i> , 435 U.S. 829 (1978)	7
<i>League of Women Voters v. FCC</i> , 547 F. Supp. 379 (C.D. Cal. 1982)	passim
<i>Lee v. Board of Regents</i> , 441 F.2d 1257, 7th Cir. (1971)	18
<i>Linmark Associates, Inc. v. Township of Willing- boro</i> , 431 U.S. 85 (1977)	7
<i>Martin v. Struthers</i> , 319 U.S. 141 (1943)	7
<i>Metromedia, Inc. v. City of San Diego</i> , 453 U.S. 490 (1981)	6, 12, 28
<i>Miami Herald Publishing Co. v. Tornillo</i> , 418 U.S. 241 (1974)	9, 18
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966)	8
<i>Minneapolis Star v. Tribune</i> , 103 S.Ct. 1365 (1983)	28
<i>Muir v. Alabama Educational Television Commis- sion</i> , 688 F.2d 1033 (5th Cir. 1982), <i>cert. denied</i> , 103 S.Ct. 1274 (1983)	19

TABLE OF AUTHORITIES—Continued

	Page
<i>NBC v. United States</i> , 319 U.S. 190 (1943)	14
<i>Nebraska Press Association v. Stuart</i> , 427 U.S. 539 (1976)	7
<i>Network Project v. CPB</i> , 561 F.2d 963 (D.C. Cir. 1977), cert. denied, 434 U.S. 1068 (1978)	17
<i>New York v. Ferber</i> , 102 S.Ct. 3348 (1982)	11
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964) ..	4
<i>Oklahoma v. CSC</i> , 330 U.S. 127 (1947)	22
<i>Organization for a Better Austin v. Keefe</i> , 402 U.S. 415 (1971)	7
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	22
<i>Pittsburgh Press Co. v. Human Relations Commission</i> , 413 U.S. 376 (1973)	8
<i>Police Department v. Mosley</i> , 408 U.S. 92 (1972) ..	7
<i>PruneYard Shopping Center v. Robins</i> , 447 U.S. 74 (1980)	18, 25
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969)	9, 10, 14, 27
<i>Regan v. Tazation with Representation</i> , 103 S.Ct. 1977 (1983)	13, 19
<i>Schad v. Mount Ephraim</i> , 452 U.S. 61 (1981)	6
<i>Schiff v. Williams</i> , 519 F.2d 257 (5th Cir. 1975)	18
<i>Schneider v. State</i> , 308 U.S. 147 (1939)	8, 21
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	24, 27
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	22
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	12, 22
<i>Spence v. Washington</i> , 418 U.S. 405 (1974)	21
<i>Stromberg v. California</i> , 283 U.S. 359 (1931)	8
<i>Tally v. California</i> , 382 U.S. 60 (1960)	7
<i>Terminiello v. Chicago</i> , 337 U.S. 1 (1949)	3, 4, 7
<i>The Luperar v. Stoneham</i> , 382 F. Supp. 495 (D. Vt. 1974)	18
<i>Thornhill v. Alabama</i> , 310 U.S. 88 (1940)	7, 8
<i>Tinker v. Des Moines School District</i> , 393 U.S. 503 (1969)	7
<i>Trujillo v. Love</i> , 322 F. Supp. 1266 (D. Colo. 1971) ..	18
<i>United Public Workers v. Mitchell</i> , 330 U.S. 75 (1947)	22

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Grace</i> , 103 S.Ct. 1702 (1983)	6
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 157 (1968)	5, 15
<i>Village of Schaumburg v. Citizens for A Better En- vironment</i> , 444 U.S. 620 (1980)	6, 7
<i>Virginia State Board of Pharmacy v. Virginia Citi- zens Consumer Council</i> , 425 U.S. 748 (1976)	7
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977)	25, 26
<i>Zucker v. Panitz</i> , 299 F. Supp. 102 (S.D.N.Y. 1969)	18

STATUTES

Communications Act of 1934, 48 Stat. 1064 (1934), as amended, 47 U.S.C. §§ 151 <i>et seq.</i> (1976)	14
Educational Television and Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64 (1962)	15
Internal Revenue Code, 26 U.S.C. § 501(C) (3), (C) (4) (1976)	19
Public Broadcasting Act of 1967, Pub. L. No. 90- 129, 81 Stat. 368 (1967)	16
47 U.S.C. § 396 (1976)	16, 27
47 U.S.C. § 398(a) (Supp. II 1978)	15, 16, 27
Public Broadcasting Amendment Act of 1981, Pub. L. No. 87-35, 95 Stat. 730 (1981)	20
Radio Act of 1927, Ch. 169, 44 Stat. 1162 (1927)	14

ADMINISTRATIVE DECISIONS AND MATERIALS

<i>Accuracy in Media, Inc.</i> , 45 F.C.C.2d 297 (1973)	12
FCC Legislative Recommendations to Congress for Revision of the Communications Act, F.C.C. Re- port No. 608 (1981)	9
FCC Office of Plans and Policy, <i>Measurement of Concentration in Home Video Markets</i> (Dec. 1982)	9
<i>In re Editorializing by Broadcast Licensees</i> , 13 F.C.C. 1246 (1949)	5
<i>Mayflower Broadcasting Corp.</i> , 8 F.C.C. 333 (1940)	5

TABLE OF AUTHORITIES—Continued

	Page
<i>Miners Broadcasting Services, Inc.</i> , 20 F.C.C. 2d 1061 (1970)	5
OMB Release No. 82-9 (Mar. 10, 1983)	21
<i>Programming Inquiry</i> , 44 F.C.C. 2303 (1960)	5
<i>RKO General, Inc.</i> , 44 F.C.C. 2d 149 (1969)	5
<i>WHDH, Inc.</i> , 16 F.C.C. 2d 1 (1969)	5
48 Fed. Reg. 3348 (1983)	21
 LEGISLATIVE MATERIALS	
108 Cong. Rec. 3,532 (1962)	15
113 Cong. Rec. 12,992 (1967)	29
113 Cong. Rec. 26,388-26,391 (1967)	29
<i>Hearings on Broadcast Editorializing Practices Before Subcomm. of the House Comm. on Interstate and Foreign Commerce</i> , 88th Cong., 1st Sess. (1963)	5
<i>Hearings on H.R. 6736 and S. 1160 Before House Comm. on Interstate and Foreign Commerce</i> , 90th Cong., 1st Sess. (1967)	29
<i>Hearings on S-1333 Before the Subcomm. of Senate Comm. on Interstate and Foreign Commerce</i> , 80th Cong. 1st Sess. (1947)	5, 6
H. Rep. No. 999, 87th Cong. 1st Sess. (1961)	15
H.R. Rep. No. 1559, 87th Cong., 2d Sess. (1962)	15
S. Rep. No. 222, 90th Cong., 1st Sess. (1967)	16
Staff of Senate Comm. on Commerce, Science and Transportation, 98th Cong., 1st Sess., <i>Print and Electronic Media: The Case for First Amendment Parity</i> (1983) (Senate Print No. 98-50) ..	9
 MISCELLANEOUS	
Brief for Respondents, <i>Grove City College v. Bell</i> , No. 82-792 (U.S., filed Aug. 5, 1983)	21
Carnegie Commission on Educational Television, <i>A Program for Action</i> (1967)	16
CPB, <i>1982 CPB Public Broadcasting Directory</i>	23
CPB, <i>Public Broadcasting Income: Fiscal Year 1982</i> (1983)	20
<i>Developments in the Law—Academic Freedom</i> , 81 Harv. L. Rev. 1045 (1968)	18

TABLE OF AUTHORITIES—Continued

	Page
Fowler & Brenner, <i>A Marketplace Approach to Broadcast Regulation</i> , 60 Tex. L. Rev. 207 (1982)	9
J. Hart, <i>Views on the News: The Developing Editorial Syndrome 1500-1800</i> (1970)	4
J. Hulteng, <i>The Opinion Function</i>	3
Kalven, <i>Broadcasting, Public Policy and the First Amendment</i> , 10 J.L. & Econ. 15 (1967)	5
Lawrence, <i>Question of Editorial Opinions on Radio</i> , N.Y. Sun, March 3, 1948, at 29, col. 1	6
L. Levy, <i>Legacy of Suppression: Freedom of Speech and Press in Early American History</i> (1960)	4
Lindsey, <i>Public Broadcasting: Editorial Restraints and The First Amendment</i> , 28 Fed. Comm. B.J. 63 (1975)	29
Note, <i>The Mayflower Doctrine Scuttled</i> , 59 Yale L. J. 759 (1950)	6
Note, <i>The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment</i> , 13 U. Mich. J. L. Ref. 541 (1980)	14
Report of the Carnegie Commission on the Future of Public Broadcasting, <i>A Public Trust</i> (1979) ..	14
E. Routt, <i>Dimensions of Broadcast Editorializing</i> (1970)	3, 4, 5
W. Sloan, <i>Pulitzer Prize Editorials</i> (1980)	3, 4
Stern, Krasnow & Senkowski, <i>The New Video Marketplace and the Search for a Coherent Regulatory Philosophy</i> , 32 Cath. U. L. Rev. 529 (1983) ..	9
Toohey, <i>Section 399: The Constitution Giveth and Congress Taketh Away</i> , 6 Educ. Broadcasting Rev. 31 (1972)	29
L. White, <i>The American Radio</i> (1947)	6

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-912

FEDERAL COMMUNICATIONS COMMISSION,
v. *Appellant,*

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.,*
Appellees.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR AMICI CURIAE
CBS INC.

NATIONAL ASSOCIATION OF BROADCASTERS
RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
IN SUPPORT OF APPELLEES LEAGUE OF WOMEN
VOTERS OF CALIFORNIA ET AL.

INTEREST OF AMICI CURIAE

CBS Inc. ("CBS") is the owner of radio and television broadcasting stations. These stations regularly convey information and provoke debate on matters of public importance through the exercise of their First Amendment right to editorialize.¹ The National Association of Broadcasters ("NAB") is a nonprofit incorporated association of radio and television broadcast stations and networks. As of September 7, 1983, NAB's membership included 4,442 radio stations, 701 television stations, and the major nationwide commercial broadcast networks. The Radio-Television News Directors Association includes approximately 2,000 news directors and others who are ac-

¹ CBS also operates national radio and television networks which do not regularly editorialize. Neither these networks nor corporate management plays any role in the formulation of station editorials, leaving that important function to the local management of CBS' individual stations.

tive in the supervision, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

Amici believe that the right of television and radio stations to editorialize on controversial issues of public importance is a vital journalistic function essential to the healthy functioning of a free press in a democratic society. The interests of amici would be directly affected by any decision that the Government could constitutionally suppress broadcast editorializing. The arguments made by the Government in this case strongly suggest that the Government believes it could prohibit the right of commercial and noncommercial stations alike to editorialize or to otherwise express their views on issues of public interest. Allowing the Government to suppress such controversial speech would deprive the public of an important source of information and would seriously undermine the First Amendment.

SUMMARY OF ARGUMENT

Whether or not motivated by a desire to restrain critical speech, government suppression of controversial speech by public broadcasters violates the First Amendment. The special characteristics of broadcasting do not support this ban; this Court has repeatedly made clear that the suppression of controversial broadcast speech cannot be justified under the First Amendment.

Nor can the Spending Power be employed to violate the First Amendment freedoms of public broadcasters to spend nonfederal funds on editorializing. Like commercial broadcasters, public broadcasters were established as independent journalistic enterprises free from Government control. The Government has advanced no compelling interest that would permit this extraordinary attempt at governmental suppression of controversial speech, and these restrictions cannot be justified as designed to prevent speech by state entities, to prevent government subsidization of "unpopular" speech or to protect public broadcasters from government efforts to influence editorial content.

ARGUMENT

I. EDITORIALIZING MAKES A VITAL CONTRIBUTION TO THE MARKETPLACE OF IDEAS, AND PROTECTION OF THE RIGHT TO EDITORIALIZE IS ESSENTIAL TO A FREE PRESS

Protection for the expression of opinion is central to the First Amendment. Since this Nation's earliest days, both formal editorializing and less formal expression of editorial opinion have played a critical role in informing the public. They have affected the course of our history by igniting public concern and stimulating public debate on matters of public interest. The editorials of any period have reflected the pulse of the Nation; "they reflect the incidents, causes, and struggles in American life."²

Editorials perform a variety of functions. Some are designed largely to inform and educate; others to intrigue and provoke; others to uncover societal injustices or governmental corruption; and yet others simply to entertain the audience.³ The editorial "is like the period at the end of the sentence; it provides a finality and an additional meaning to what has been said before."⁴

Government—including Congress, the President, the bureaucracy, and this Court—is frequently a target of criticism in some of the most influential editorials.⁵ The editorial is thus often the ideal format for speech designed "to invite dispute," "to provok[e] and challeng[e]," and to "strike at prejudices and preconceptions and [to] have profound and unsettling effects as it presses for accept-

² W. Sloan, *Pulitzer Prize Editorials* (inside cover) (1980) [hereinafter cited as *Pulitzer Editorials*].

³ E. Routt, *Dimensions of Broadcast Editorializing* 86 (1970) [hereinafter cited as *Broadcast Editorializing*].

⁴ Linn, *Introduction to Broadcast Editorializing* at 9. See also J. Hulteng, *The Opinion Function* 12-13 (1973).

⁵ *Broadcast Editorializing* at 86-196. The legislative history of Section 399 indicates that fear of this criticism was a motivating factor in the passage of Section 399. See pp. 28-29 *infra*.

ance of an idea." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). As such editorial speech is a vital part of our "profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

The expression of editorial opinion has greatly influenced the course of public affairs. The forerunners to the modern editorial were the newsletter, the pamphlet and the old news ballad.⁶ Each of these played an influential role in the colonial period and post-American Revolution era. Early "editorial" writers during this period included Benjamin Franklin, John Adams, John Dickinson, Thomas Paine, and John Peter Zenger. British attempts to suppress the published opinions of Zenger and others played a large part in the adoption of the First Amendment.⁷ By the end of the Nineteenth Century the editorial had become commonplace in American newspapers.⁸ Numerous editorials have had a major impact on our history, influencing the election of Presidents,⁹ the mobilization of popular support for the American role in World War I and World War II,¹⁰ and the mobilization of popular opinion against racial injustice.¹¹ Broadcast edi-

⁶ News ballads were songs interpreting current events. They had a significant effect on the early American populace. J. Hart, *Views on the News: The Developing Editorial Syndrome 1500-1800*, at 198 (1970).

⁷ L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 128-33 (1960).

⁸ J. Hart, *supra*, at 203.

⁹ An editorial by William Allan White in the *Emporia (Kansas) Gazette* "is given considerable credit in the election of William McKinley as President of the United States." *Broadcast Editorializing* at 77.

¹⁰ *Pulitzer Editorials* at 7, 59.

¹¹ Grover Cleveland Hall's series of anti-Klan editorials in the *Montgomery Adviser* during the 1920's are good examples of the influence editorials can have on public affairs. "As a consequence of Hall's campaign, victims of floggings, too frightened before, talked to law officers and journalists, numerous Klansmen were

torials have also made vital contributions to the marketplace of ideas.¹² Recognizing these contributions, the FCC has long encouraged licensees to editorialize.¹³

convicted, and the number of floggings in Alabama declined dramatically." *Id.* at 31. Governor Harry Byrd of Virginia reported that the editorials in the *Virginia-Pilot* "had more to do than any other single outside urging in convincing me that I should make one of my major recommendations the passage of a drastic anti-lynching law providing that lynching be a specific state offense." *Id.* at 33. These and later editorials on the same subjects "sparked national interest in [anti-lynching] law[s]." *Id.*

¹² *Broadcast Editorializing* at 112-20, 125-30; *Hearings on Broadcast Editorializing Practices Before Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. 296 (1963) [hereinafter cited as *Hearings on Broadcast Editorializing*].

As Americans rely more and more upon television and radio as their primary source of information, the role of editorial speech by broadcasters takes on increasing importance.

[Broadcasting is] a vital part of our system of communication. The electronic media have swiftly become a major factor in the dissemination of ideas and information To a large extent they share with the printed media the role of keeping people informed.

CBS v. DNC, 412 U.S. 94, 116 (1973) (opinion of Burger, C.J.). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & Econ. 15, 16 (1967).

¹³ See *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949); *Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960); *Hearings on Broadcast Editorializing* at 87 (statement of Chairman E. William Henry on behalf of the FCC); *WHDH, Inc.*, 16 F.C.C.2d 1, 10, 12-13 (1969); *RKO General, Inc.*, 44 F.C.C.2d 149, 219 (1969); *Miners Broadcasting Services, Inc.*, 20 F.C.C.2d 1061 (1970).

In *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339-41 (1940), the FCC suggested that editorializing by commercial and noncommercial broadcasters might be impermissible. The so-called *Mayflower* doctrine generated substantial criticism in its time and the FCC clearly repudiated such a policy in *In re Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). See, e.g., *Hearings on Broadcast Editorializing* at 151 (statement of Commissioner Ford) ("Commission's decision in the *Mayflower* case was roundly criticized by Congress."); *Hearings on S-1333 Before Subcomm. of*

II. GOVERNMENT SUPPRESSION OF CONTROVERSIAL SPEECH IS PRESUMPTIVELY UNCONSTITUTIONAL

Difficult First Amendment questions may arise where government action indirectly impinges on the rights of free speech or press. However, the statute involved here presents no such difficult questions. It was avowedly designed to suppress a critical category of speech that makes a central contribution to the marketplace of ideas.

The First Amendment, having been "designed to prevent the Government from suppressing information,"¹⁴ does not tolerate such interdiction of speech on controversial issues. Time and time again this Court has invalidated governmental efforts at suppression despite the creative justifications that have been advanced. *E.g.*, *United States v. Grace*, 103 S. Ct. 1702 (1983) (prohibition of displays of banners on Supreme Court grounds in order to protect order and decorum at the Court); *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983) (prohibition of mailing unsolicited contraceptive advertisements); *Brown v. Hartlage*, 456 U.S. 45 (1982) (prohibition of candidate's promise to lower his salary if elected); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion) (prohibition of billboard advertising); *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (prohibition of all live entertainment as a zoning restriction); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980) (prohibition of controversial speech in utility bill inserts); *Carey v. Brown*, 447 U.S. 455 (1980) (prohibition of picketing in residential neighborhoods in order to protect privacy); *Village of Schaumburg v. Citizens for a Better Environ-*

Comm. on Interstate and Foreign Commerce, 80th Cong., 1st Sess. 110-12 (1947) (statement of Justin Miller); L. White, *The American Radio* 176-78 (1947); Note, *The Mayflower Doctrine Scuttled*, 59 Yale L.J. 759 (1950); Lawrence, *Question of Editorial Opinions on Radio*, N.Y. Sun, Mar. 3, 1948, at 29, col. 1.

¹⁴ *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2887 (1983) (Rehnquist, J., concurring in the judgment).

ment, 444 U.S. 620 (1980) (prohibition of solicitation by charities devoting more than 25% of revenue to overhead); *First National Bank v. Bellotti*, 435 U.S. 765 (1978) (prohibition of corporate speech in order to prevent undue influence); *Landmark Communications v. Virginia*, 435 U.S. 829 (1978) (prohibition of speech about confidential judicial misconduct proceedings); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (prohibition of "for sale signs" in order to halt white flight); *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) (prohibition of teachers' speaking at school board meetings); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976) (prohibition of newspaper coverage of murder in order to preserve right to fair trial); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (prohibition of commercial speech about drug prices in order to maintain high standards for pharmacies); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (prohibition on drive-in movies containing nudity in order to protect passersby); *Police Department v. Mosley*, 408 U.S. 92 (1972) (prohibition of picketing to protest employment discrimination in order to prevent disruption of nearby school); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (prohibition of leafletting in residential neighborhood in order to protect privacy); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (prohibition of advocacy of doctrines of violence in order to minimize likelihood of violent assemblies); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (prohibition of wearing of arm-bands in order to avoid disruption of school environment); *Tally v. California*, 382 U.S. 60 (1960) (prohibition of anonymous handbills in order to be able to identify those responsible for fraud, false advertising or libel); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (prohibition of race-baiting speech in order to prevent breach of peace); *Martin v. Struthers*, 319 U.S. 141 (1943) (prohibition of door-to-door distribution of circulars in order to protect privacy in one's home); *Thornhill v.*

Alabama, 310 U.S. 88 (1940) (prohibition of picketing in order to avoid breach of peace or disruption of industrial relations); *Schneider v. State*, 308 U.S. 147 (1939) (prohibition of leafletting in order to reduce litter); *Stromberg v. California*, 283 U.S. 359 (1931) (prohibition of display of red flag in order to suppress the spread of communism or anarchy).

Despite allegations of compelling justification this Court has invalidated a governmental prohibition of editorializing. In *Mills v. Alabama*, 384 U.S. 214 (1966), an Alabama statute was construed to prohibit the publication of political editorials on election day. A newspaper editor was charged with publishing an election day editorial in favor of changing Birmingham's form of government. The statutory prohibition was said to be necessary to protect the public from confusing last-minute charges that could not be answered before the election. *Id.* at 219-20. Nonetheless, the Court held that, "[i]t is difficult to conceive of a more obvious and flagrant abridgment of constitutionally guaranteed freedom of the press." *Id.* at 219. For,

[s]uppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.

Id. Following *Mills*, the Court has reaffirmed "unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 391 (1973). And just recently in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980), this Court struck down a statute that barred utility companies from expressing "their opinions or viewpoints on controversial issues of public policy" in utility bill inserts. *Id.* at 533-34.

In light of these decisions, government suppression of editorials—whatever the justification—cannot survive un-

der the First Amendment. Nor is this any less true in the broadcast medium. While the Government urges that the "special characteristics of broadcasting"¹⁵ somehow support the statutory prohibition, here, as the District Court found, the Government has identified no characteristic of the broadcast medium that supports such suppression. 547 F. Supp. at 384. Indeed, the very alleged "scarcity" of broadcast frequencies strongly suggests both the un wisdom and unconstitutionality of suppressing editorial speech on the limited number of frequencies that are available.¹⁶

This Court's decisions hardly support the Government's position. To be sure this Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), held that it was constitutional for the FCC to require broadcasters who present political editorials and other speech on controversial issues of public importance to present opposing views—a requirement subsequently held invalid as to the print press.¹⁷ But it did so based on the express findings that there was no direct restraint on speech and that any indirect effect—which "would indeed be a serious matter"—was "at best speculative." *Id.* at 393. As the Court stressed

¹⁵ Brief for the United States at 28-32 [hereinafter cited as "Brief"].

¹⁶ Moreover, numerous recent studies indicate that there is substantial reason to question the Government's premise as to the continued scarcity of broadcast frequencies. See, e.g., Staff of Senate Comm. on Commerce, Science and Transportation, 98th Cong., 1st Sess., *Print and Electronic Media: The Case for First Amendment Parity* 2, 54, 56-83 (1983) (Senate Print No. 98-50); FCC Legislative Recommendations to Congress for Revision of the Communications Act, F.C.C. Report No. 608 (1981); Office of Plans and Policy, Federal Communications Commission, *Measurement of Concentration in Home Video Markets* 90-97 (Dec. 1982); Stern, Krasnow & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 Cath. U. L. Rev. 529, 562-66 (1983); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 221-26 (1982).

¹⁷ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974).

There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views Such questions would raise more serious First Amendment issues.

Id. at 396. Moreover, the decision in *Red Lion*, in sustaining the requirement of the fairness doctrine that broadcasters discuss controversial issues, made clear that in broadcasting the First Amendment is best served by encouraging, rather than suppressing, controversial speech. *Id.* at 389-90, 392, 394.

The two other cases permitting Congress and the FCC to regulate broadcast programming, *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), likewise provide no justification for the suppression of editorializing.¹⁸

The limited access requirement upheld in *CBS, Inc. v. FCC* was held not to suppress broadcaster speech. The Court emphasized that "the statute does not impair the discretion of broadcasters to present their views on any issue." 453 U.S. at 397. And the statute provided only a limited right of access to the media for certain federal candidates. As the Court noted, "it has never approved a general right of access to the media." *Id.* at 396. In *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), the Court refused to recognize a general right of access for editorial advertising because it would unacceptably run "the risk of an enlargement of Government control over the content of broadcast discussion of public issues." *Id.* at 127.¹⁹

¹⁸ See also *FCC v. National Citizens Comm'n for Broadcasting*, 436 U.S. 775, 801 (1978) (upholding restrictions on cross-ownership of newspapers and broadcast licenses which would not in any way "limit the flow of information").

¹⁹ "The broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties].'" *CBS, Inc. v. FCC*, 453 U.S. at 395. (quoting *CBS v. DNC*, 412 U.S. at 110).

The only case in which the Court has even suggested that suppression of broadcaster speech would be permissible was *FCC v. Pacifica Foundation*. But that case upheld only the FCC's limited regulation of the broadcast of indecent material because of concern that "[p]atently offensive, indecent material" would be "accessible to children, even those too young to read." 438 U.S. at 748-49. The Court thought it necessary "to emphasize the narrowness of [its] holding" (*id.* at 750). Stressing that the FCC had only "channelled" indecent speech away from early afternoon hours when children were listening (*id.* at 731, 750), it noted that the FCC did not "un- equivocally close[] . . . broadcasting to speech of this sort." *Id.* at 750 n.28.²⁰ Section 399, in contrast, is not designed to protect children from indecent speech by channeling broadcasts to particular hours; it constitutes a heavy-handed suppression of speech necessary to an informed citizenry.

Thus, despite the Government's contention, the prohibition of editorializing finds no support in this Court's decisions. In the broadcast medium, as in the print press, the suppression of speech on controversial issues is impermissible.

Section 399's prohibition of editorial speech is especially egregious for three further reasons.

First, Section 399's prohibition is based on the content of speech. It bans only one kind of speech—editorial speech. This Court has always recognized that the First Amendment is particularly designed to prevent content-based suppression and has "sustained content-based restrictions only in the most extraordinary circumstances,"

²⁰ The limited nature of this Court's decision in *Pacifica* is further evidenced by the special First Amendment treatment given to child pornography statutes in *New York v. Ferber*, 102 S. Ct. 3348 (1982). There the Court relied on *Pacifica* to support the proposition that protecting the well-being of minors is a "government objective of surpassing importance" that justifies affording a lesser degree of First Amendment protection. *Id.* at 3355.

Bolger v. Youngs Drug Products Corp., 103 S. Ct. 2875, 2879 (1983). This is true whether the government seeks to bar discussion on a particular topic or more broadly seeks to bar a particular type or format of speech. *Metro-media, Inc. v. City of San Diego*, 453 U.S. 490, 514, 518-19 (plurality opinion); *Consolidated Edison*, 447 U.S. at 537-38; *First National Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978). To allow the Government to ban particular categories of speech would enable it to suppress the potentially most effective and critical form of speech, and thus to suppress criticism.

Second, Section 399 will have a serious chilling effect on public broadcasting because there is no clear-cut line between editorializing and other protected speech. While the Broadcast Bureau of the FCC has said that it "believes that Section 399 should be interpreted as proscribing programs commonly recognized as editorializing," *Accuracy in Media, Inc.*, 45 F.C.C.2d 297, 302 (1973), Representative Springer—the editorializing ban's leading proponent—conceded that "We went over that with our counsel in every way, and we could not come up with any language we thought was meaningful . . ." 113 Cong. Rec. 26,388 (1967). The line between editorials, commentary, analysis, and investigatory journalism is often less than clear. The prohibition on editorials will have an inevitable chilling effect on speech that "falls close to the line separating the lawful and the unlawful." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).²¹

Finally—whether or not section 399 itself was adopted because of government hostility to controversial speech (see below pp. 25-29)—sustaining Section 399 would convey a message to noncommercial and commercial broadcasters alike that Congress or the FCC may act to suppress broadcast speech on public issues if it becomes too

²¹ The Broadcast Bureau further defined editorializing as "the propagation of the licensees' own views on public issues" by management or others speaking on behalf of the licensees. 45 F.C.C.2d at 302. This definition also fails to distinguish adequately between editorials and other journalistic speech.

critical or controversial. Thus, Section 399 affects far more than editorializing; it inhibits all controversial speech. In the long run, the public may be deprived of a wide variety of ideas and information by the ban on editorials.

III. THE PROHIBITION ON EDITORIALIZING CAN- NOT BE JUSTIFIED BY THE SPECIAL CHARAC- TERISTICS OF PUBLIC BROADCASTING

Nonetheless, the Government seeks to justify the statute's suppression of editorial speech because public broadcasters are partially subsidized by federal funds. Brief at 33-47. It suggests that Section 399 is a valid exercise of Congress' Spending Power and relies heavily on this Court's recent decision in *Regan v. Taxation With Representation* ("TWR"), 103 S. Ct. 1997 (1983). In *TWR* the Court upheld a denial of tax exemption status to an organization engaged in lobbying activity. It held that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying." *Id.* at 2001.

As discussed below, *TWR* is clearly inapposite both because *TWR* did not involve restrictions on speech by a journalistic entity and because, unlike the statute in *TWR*, Section 399 is not a restriction limited to the expenditure of federal funds. If a station receives any CPB funding, Section 399 prohibits expenditures for editorializing whatever the source of the funds used for editorializing.²²

²² Section 399 is distinguishable from *TWR* for yet another reason. Section 399 discriminates on the basis of speech content by prohibiting the category of speech that is potentially most critical of Government and, as discussed below, was designed to suppress such critical speech. "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim at the suppression of dangerous ideas.'" *TWR*, 103 S. Ct. at 2002 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)). "A statute designed to discourage the expression of particular views would present a very different question." 103 S. Ct. at 2004 (Blackmun, J., concurring).

A. The First Amendment Precludes Governmental Interference With the Editorial Freedom of Independent Journalistic Entities Even When They Are Dependent on Government Funding

Although the FCC did not specifically set aside frequencies for noncommercial and educational users until 1939, public broadcasting has been in existence since 1919 when the University of Wisconsin began broadcasting over station 9XM.²³ Many of the early licensees were educational institutions.²⁴

Public broadcasting licensees were, like commercial licensees, governed by the Radio Act of 1927²⁵ and then the Communications Act of 1934.²⁶ The history of these Acts is well known.²⁷ Congress rejected federal government ownership and operation of broadcast stations. Instead, Congress chose to adopt a system of public trusteeship under which licensees were to be responsible and accountable for selecting material as fiduciaries for the interests of the people as a whole. Central to this approach, was Congress' evident determination to "preserve values of private journalism" by vesting licensees, commercial and noncommercial alike, "with the widest journalistic freedom consistent with [their] public obligations." *CBS v. DNC*, 412 U.S. at 105, 109-11. This Court has consistently stressed that the exercise of independent editorial judgment is essential to the integrity and inde-

²³ Report of the Carnegie Commission on the Future of Public Broadcasting, *A Public Trust* 33 (1979) [hereinafter cited as *Second Carnegie Report*]; Note, *The Public Broadcasting Act: The Licensee Editorializing Ban and the First Amendment*, 13 U. Mich. J.L. Ref. 541, 543 (1980).

²⁴ *Second Carnegie Report* at 34.

²⁵ Ch. 169, 44 Stat. 1162 (1927).

²⁶ 48 Stat. 1064 (1934), as amended, 47 U.S.C. §§ 151 *et seq.* (1976).

²⁷ See, e.g., *CBS v. DNC*, 412 U.S. at 103-10; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 379-86; *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-17 (1943).

pendence of journalistic entities which Congress so carefully sought to preserve. *Id.* at 111, 116, 124-25; *FCC v. Mid-West Video Corp.*, 440 U.S. at 704-05.

Noncommercial broadcasters were viewed as "an essential element 'of an adequate national television system'" that would "provide a much needed source of cultural and informational programming for all audiences" ²⁸ As an integral part of the broadcasting community, Congress intended public broadcasters to enjoy the same journalistic independence as other licensees, for "the Act's terms, purposes, and history all indicate that Congress 'formulated a unified and comprehensive regulatory system for the [broadcasting] industry.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940)). ²⁹

It was not until 1962 that Congress provided the first federal assistance to public broadcasters. The Educational Television and Facilities Act of 1962 ³⁰ authorized the expenditure of \$32 million to aid in the construction of noncommercial broadcasting facilities. Nothing in this Act purported to change the independent journalistic status of educational stations. In fact, Congress added a specific prohibition against governmental "direction, supervision, or control" of public broadcasting. 47 U.S.C. § 398(a). ³¹

²⁸ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 175 n.41 (1968) (quoting H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3-4 (1962)).

²⁹ See *Community Television of Southern California v. Gottfried*, 103 S. Ct. 885 (1983) (Communications Act does not impose greater obligation on public broadcasters to provide special programming for hearing impaired); *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 291 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976).

³⁰ Pub. L. No. 87-447, 76 Stat. 64 (1962).

³¹ While the Section's language states that government officials are not "authorize[d]" to engage in such activities, the section is captioned "prohibition" and was clearly intended to be such. H. Rep. No. 999, 87th Cong., 1st Sess. 8 (1961); 108 Cong. Rec. 3532 (1962)

Five years later, in response to the report and recommendations of the First Carnegie Commission on the Future of Public Broadcasting,³² Congress enacted the Public Broadcasting Act of 1967.³³ That Act provided additional construction assistance and also, for the first time, appropriated federal funds to supplement private and state and local governmental support for the production of cultural and educational programs. Again, Congress emphasized its determination that public stations retain their status as independent journalistic entities. Thus, Congress noted the central role public broadcasting plays as an integral part of the Nation's broadcast community, 47 U.S.C. § 396(a)(5), and reiterated its intention "to afford [public broadcasters] maximum protection from extraneous interference and control." *Id.* § 396(a)(7). "We wish to state in the strongest terms possible that it is our intention that local stations be absolutely free to determine for themselves what they should or should not broadcast." S. Rep. No. 222, 90th Cong., 1st Sess. 11 (1967). In addition to § 398(a)'s prohibition of governmental interference, Congress took other specific measures to ensure that noncommercial broadcasters would be insulated from any governmental attempts at influence or control. The key to this insulation was the creation of an independent, private "Corporation for Public Broadcasting" responsible for disbursing federal funds while affording broadcasters complete journalistic autonomy. 47 U.S.C. § 396; *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1107-08 (D.C. Cir. 1978) (en banc).

Thus, Congress has made clear that public broadcasters are to play a valuable role as an integral part of the

(remarks of Rep. Walter); *id.* at 3533 (remarks of Rep. Harris); *id.* at 3549 (remarks of Rep. Barry).

³² Carnegie Commission on Educational Television, *A Program for Action* (1967).

³³ Pub. L. No. 90-129, 81 Stat. 367 (1967) (codified at 47 U.S.C. §§ 390 *et seq.*).

Nation's press. It has gone to extraordinary lengths to preserve the journalistic integrity and independence of noncommercial licensees. Without doubt, Congress meant for public broadcasting stations to be something very different from government-run entities.³⁴

Having determined to preserve the traditional journalistic function of noncommercial broadcasters and generally to preserve the editorial freedom necessary to that independence, the First Amendment does not permit the Government to intrude selectively by barring editorializing. Subsidization of an independent journalistic entity by government should not mean that the entity loses its First Amendment rights. Numerous lower courts in a variety of contexts have held that the fact that school newspapers or other journalistic entities are government-subsidized does not in any way lessen the First Amendment rights of the editors of those publications.³⁵

³⁴ Not surprisingly the one provision of the 1967 Act other than Section 399 at variance with this approach has also been struck down as unconstitutional. In *Community-Service Broadcasting v. FCC*, the District of Columbia Circuit invalidated 47 U.S.C. § 399(b), which required all noncommercial stations receiving federal funding to make audio recordings of all broadcasts "in which any issue of public importance is discussed." The Court found that this requirement posed a constitutionally unacceptable "risk of direct governmental interference in program content." 593 F.2d at 1105.

The Act has also been construed in other cases to avoid indirect intrusions upon licensee editorial freedom. In *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288 (D.C. Cir. 1975), cert. denied, 425 U.S. 934 (1976), the court held that the FCC could not enforce the Act's "objectivity and balance" of program requirement against CPB since such enforcement would entail governmental supervision in contravention of the statutory scheme providing licensee freedom from interference. See also *Network Project v. CPB*, 561 F.2d 963 (D.C. Cir. 1977) (no private cause of action against Corporation For Public Broadcasting to enforce these requirements), cert. denied, 434 U.S. 1068 (1978).

³⁵ *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970); *Avins v. Rutgers*, 385 F.2d 151, 153-54 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968). See also *Bazaar v. Fortune*, 476 F.2d

In particular, the First Amendment protects against governmental efforts to interfere with the editorial freedom of independent journalistic entities receiving government subsidies. For example, the lower federal courts without exception have held that the First Amendment precludes state universities from banning controversial speech by subsidized school publications.³⁶ Just as government cannot interfere with the journalistic integrity of a student publication, so too the First Amendment does not permit Congress to pick and choose among the types of permissible speech by public broadcasters and to ban the most controversial and potentially critical form of speech.³⁷

570, 575 (5th Cir.), *aff'd as modified en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); *Gambino v. Fairfax City School Board*, 429 F. Supp. 731, 734 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977); *The Luperon v. Stoneman*, 382 F. Supp. 495, 499-500 (D. Vt. 1974); *Korn v. Elkins*, 317 F. Supp. 138, 143 (D. Md. 1970); *Developments in the Law—Academic Freedom*, 81 Harv. L. Rev. 1045, 1130 (1968).

³⁶ *Bazaar v. Fortune*, 476 F.2d at 575; *Trujillo v. Love*, 322 F. Supp. 1266, 1270 (D. Colo. 1971); *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967), *vacated as moot sub nom. Troy v. State Univ.*, 407 F.2d 515 (5th Cir. 1968); *Schiff v. Williams*, 519 F.2d 257, 260 (5th Cir. 1975); *see also Joyner v. Whiting*, 477 F.2d 456, 460 (5th Cir. 1973); *Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969); *ACLU v. Radford College*, 315 F. Supp. 893, 896-97 (W.D. Va. 1978); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970).

³⁷ This Court has also recognized that the journalistic nature of an entity implicates First Amendment protections against State interference. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court held that a state could force a shopping center owner to let others speak on his property. The Court distinguished a shopping center from a journalistic enterprise. A statute imposing on the First Amendment rights of a journalistic entity would be different, for that would be "an 'intrusion into the function of editors.'" 447 U.S. at 88 (quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 258).

In *Board of Education v. Pico*, 102 S. Ct. 2799 (1982), this Court found a First Amendment limitation on school board control over the content of school libraries. Here, this Court need not reach the

B. The First Amendment Bars Exercise of the Spending Power To Suppress Editorial Speech

TWR is distinguishable for another reason. Section 399, unlike the statute in *TWR*, imposes an unconstitutional condition on the receipt of a governmental benefit. In *TWR*, organizations that were denied certain tax benefits because they engaged in substantial lobbying activity contended that this denial was an unconstitutional condition on the receipt of those benefits.³⁸ But this Court disagreed, finding that the Internal Revenue Code provisions were narrowly drawn regulations governing federal spending (by way of tax benefits) that did not infringe on First Amendment activity.

The Code does not deny *TWR* the right to receive deductible contributions to support its non-lobbying activity, nor does it deny *TWR* any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. . . . Congress has not infringed any First Amendment rights or regulated any First Amendment activity.

103 S. Ct. at 2001. *See also id.* at 2005 (Blackmun, J., concurring) (any significant restriction of *TWR*'s other channels of communication would pose insurmountable First Amendment problems). The carefully drawn Internal Revenue Code provisions permitted *TWR* to secure the tax benefits for its nonlobbying activity by setting up a lobbying affiliate organization, which would then perform all lobbying activities. I.R.C. § 501(c)(4); *see*

question of First Amendment limits on government control over its own expression, *see generally* *Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. denied*, 103 S. Ct. 1274 (1983), since it is clear that Congress intended for public broadcasters to be independent journalistic entities.

³⁸ Such organizations were denied tax exempt status and the ability to receive contributions that could be deducted by the individual contributors. I.R.C. § 501(c)(3), (c)(4) (1976).

103 S. Ct. at 2000 & n.6; *id.* at 2004-05 (Blackmun, J., concurring).

In contrast to this narrow regulation of the use of federal funds in *TWR*, Section 399 does not merely deny federal funds for editorializing. It directly restrains First Amendment-protected activity through a sweeping ban on the use of funds from any source for editorializing.³⁹ As the District Court found, "CPB funding in 1977 did not constitute more than approximately 25% of the funding received by funded noncommercial broadcasters and . . . no broadcaster receives more than approximately 33% of its funds through CPB grants." 547 F. Supp. at 385. Most public broadcasting funding comes from private, corporate, and local governmental sources, and many stations received only small federal grants. CPB, *Public Broadcasting Income: Fiscal Year 1982*, at 4 (1983).

Section 399 fails to permit public broadcasters to set up affiliate entities to spend nonfederal funds on editorializing. Broadcast editorializing by a separate entity is impossible since an additional frequency is unlikely to be available for a nonfederally funded affiliate and if the original entity were to make time available to its affiliate on its own frequency, Section 399 would be equally violated. Section 399 thus bars a station receiving any CPB funding from all editorializing no matter how insignificant the federal funding and how unrelated that funding is to editorializing.⁴⁰ Section 399 infringes both the

³⁹ Section 399 originally prohibited editorializing by public broadcasting stations whether or not they received CPB funding. 47 U.S.C. § 399 (1976). Congress amended this provision in the Public Broadcasting Amendment Act of 1981, Pub. L. No. 87-35, 95 Stat. 730, making the ban on editorializing applicable only to stations receiving some CPB funding.

⁴⁰ The government argues that there would be a federal subsidy involved in any editorial speech by noncommercial broadcasters because of federal subsidies of noncommercial station overhead or capital expenses. Brief at 44-45. Such a miniscule and indirect

stations' First Amendment right to spend nongovernmental funds on editorial speech and the rights of nongovernmental contributors to make contributions for editorializing.⁴¹

The Government nonetheless argues that here the use of nonfederal funds is not necessarily restricted since

federal subsidy is too attenuated to justify the outright suppression of privately funded speech. In today's society, if one traces almost any activity back far enough, there is bound to be some incidental federal support. To justify the suppression of speech on such a basis would reduce the First Amendment to a dead letter. It is noteworthy that the Government has urged this Court in another pending case to adopt a commonsense approach rather than to follow to the end "the economic ripples generated by federal aid." Brief for Respondents at 15, *Grove City College v. Bell*, No. 82-792 (U.S., filed Aug. 5, 1983).

The broad ramifications of the Government's argument are illustrated by a recent Government proposal to limit political advocacy by all recipients of federal grants and contracts. 48 Fed. Reg. 3348 (Jan. 24, 1983). As is urged here, it was suggested that such a widespread curtailment of First Amendment activity was constitutional because the receipt of federal funds for overhead costs effectively subsidized political activity. The proposal was recently withdrawn due to its obvious constitutional difficulties. OMB Release No. 82-9 (Mar. 10, 1983). But the fact that it was made demonstrates the potentially wide repercussions of a ruling that the receipt of federal funds (no matter how indirect or inconsequential) justifies the suppression of protected First Amendment activity financed by private funding.

⁴¹ See *Buckley v. Valeo*, 424 U.S. 1, 19, 24-25 (1976). The Government suggests that this deprivation is permissible because public broadcasters are free to express their views on commercial stations or in letters to their contributors. Brief at 41-42, 44. But this Court has repeatedly rejected such attempts to suppress speech on the ground "that it may be exercised in some other place," *Schneider v. State*, 308 U.S. 147, 163 (1939). See *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. at 2882 n.18; *Consolidated Edison Co.*, 447 U.S. at 541 n.10; *Spence v. Washington*, 418 U.S. 405, 411 & n.4 (1974). Allowing the Government to specify the medium for critical speech would largely undermine the First Amendment.

"any station that finds the ban on editorializing unduly restrictive is free to decline CPB grants." Brief at 41, 42. But the guarantees of the Constitution, "so carefully safeguarded against direct assault," are not "open to destruction" by such indirect means. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593 (1926). Constitutional rights are not for sale whenever the government pays the right price.⁴² "[C]onditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963).

Thus, reliance on the Spending Power does not vitiate the need for proof of a "compelling state interest" to justify suppression of speech. *Id.* at 403, 406; *Speiser v. Randall*, 357 U.S. at 529; *Community-Service Broadcasting v. FCC*, 593 F.2d at 1110 n.17. As the District Court concluded, "Section 399 can survive scrutiny under the First Amendment only if it meets the standard generally used in First Amendment cases, that is, that it serves a compelling government interest and is narrowly tailored to that end." 547 F. Supp. at 384.⁴³ As we next demonstrate, Section 399 serves no such compelling interest.

⁴² *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (plurality opinion); *Community-Service Broadcasting v. FCC*, 593 F.2d at 1110 n.17.

⁴³ Contrary to the Government's contention (Brief at 35 n.64, 42 n.73) cases upholding restrictions on the First Amendment rights of government employees are inapposite. *E.g.*, *Oklahoma v. CSC*, 330 U.S. 127 (1947); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); see also *Connick v. Myers*, 103 S. Ct. 1684 (1983); *CSC v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). These cases all involved the unique interest of prevention of corruption of government service. Certain political activities were found to be inconsistent with the duties of government service, but the statutes allowed employees substantial freedom to express their opinions. 103 S. Ct. at 1692-93; 413 U.S. at 561, 579; 330 U.S. at 94-101.

IV. THE GOVERNMENT HAS NOT ADVANCED ANY COMPELLING INTEREST TO SUPPORT THE SUPPRESSION OF EDITORIALIZING BY PUBLIC STATIONS

A. Suppression of Speech of State and Local Governments Is Not a Legitimate Government Interest

The Government suggests that Section 399 is justified as a legitimate control on the speech of state and local governments. Brief at 6, 21, 36, 42 & n.73. Even if the interest—advanced for the first time on the appeal to this Court—were sufficiently compelling, Section 399 is overbroad.⁴⁴ The premise of this argument is that most non-commercial broadcasters are state and local governments, but the Government ultimately is compelled to admit that many public licensees, including Appellee Pacifica, are privately owned. Brief at 20-21, 42-43 n.73.

Furthermore, the assumption behind this argument—that governmental owners will irresponsibly foster unseemly governmental propagandizing—is far too speculative a harm to justify suppression of speech.⁴⁵ The Government presents no evidence that public stations owned by state entities have engaged in editorial propaganda in editorials before Section 399 was enacted or that they have used other programming, either before or after the ban, for the purpose of disseminating government propaganda. As the Government itself recognizes, many stations owned by governmental entities, including those run by universities, are already insulated from state governmental control or protected from political interference. Brief at 37 n.67.⁴⁶ Therefore, even assuming a compelling interest, there is “no substantially relevant correlation

⁴⁴ See *First National Bank v. Bellotti*, 435 U.S. at 79°.

⁴⁵ See *Consolidated Edison Co.*, 447 U.S. at 543 (“mere speculation of harm does not constitute a compelling state interest”); *Buckley v. Valeo*, 424 U.S. at 93 n.126.

⁴⁶ Many of the government-affiliated public broadcasting stations are university owned. CPB, 1982 *CPB Public Broadcasting Directory*.

between the governmental interest asserted and the State's effort' to prohibit [noncommercial broadcasters] from speaking." *First National Bank v. Bellotti*, 435 U.S. at 795 (quoting *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)).

In any event, federal control of the content of speech of state governmental entities would seriously impinge on state sovereignty and is not a legitimate interest. A state's ability to control the content of its own speech to its citizens ranks high on the list of "indisputabl[e] 'attributes of state sovereignty.'" *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 287-88 (1981) (citation omitted).⁴⁷ If the federal government can interfere with a state's communications with its citizens, it would "allow 'the National Government [to] devour the essentials of state sovereignty.'" *EEOC v. Wyoming*, 103 S. Ct. 1054, 1060 (1983) (citations omitted). Ultimately, the federal government would be able to suppress any criticism by state governments of the federal government.

B. Section 399 Cannot Be Justified On the Ground That It Avoids Taxpayer Subsidization of Unpopular Speech

The Government suggests that the suppression of editorial speech avoids taxpayer subsidization of "private political views that may be unwelcome or even repugnant to many taxpayers." Brief at 39-40 & n.72.

It is difficult to believe that the Government can seriously advance this argument.⁴⁸ If adopted, it would give the Government the most extraordinary power to suppress

⁴⁷ Compare *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (authority to make governmental decisions is quintessential attribute of state sovereignty).

⁴⁸ At bottom, the Government's argument amounts to no more than a reassertion of its unavailing Spending Power argument in slightly different garb.

unpopular opinion and dissenting views. The First Amendment will not tolerate such abuse.

Even if the Government could refuse to spend money in order to protect the freedom of taxpayers not to subsidize views with which they disagree, the Government certainly cannot urge this interest to deprive other taxpayers (public broadcasters and their contributors) of the right to spend their *own* money on editorial speech.⁴⁹

The Government relies on *Wooley v. Maynard*, 430 U.S. 705 (1977), as authority. There a New Hampshire statute requiring automobile owners to use license plates bearing the state motto was held invalid because individuals were forced to be personal instruments for the state's ideological message. It forced

an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.

Id. at 715. But government expenditure of taxpayer money on noncommercial broadcasting does not require taxpayers to affirm their belief in the views expressed by public broadcasters as does the personal display of a message on one's car; such expenditures hardly implicate the "individual freedom of mind" at stake in *Wooley*, *id.* at 714.⁵⁰

⁴⁹ The Government's reliance upon the taxpayer subsidization rationale is also belied by the underinclusiveness of Section 399. See *First National Bank v. Bellotti*, 435 U.S. at 793. That the Government was not concerned with taxpayer subsidization of controversial programming on public broadcasting stations undermines any genuine interest in protecting taxpayers against subsidization of controversial speech. Many taxpayers arguably are unhappy that any of their taxes go to support public television programs of which they disapprove. The Government's argument here suggests that it could and perhaps should exercise control over all public broadcasting content to protect the interests of such taxpayers.

⁵⁰ The Court has made clear that *Wooley* is inapplicable where there is no identification of the individual with particular speech. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the

Likewise the Government cannot properly analogize this situation to cases involving member subsidization of political speech by organizations such as labor unions. *E.g., Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *cf. First National Bank v. Bellotti* (corporate subsidization by shareholders). Political expenditures by such organizations involve an element of attribution of belief (through membership) that is not present in the case of general taxpayer spending. "Compelled support of a private association is fundamentally different from compelled support of government." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in the judgment).⁵¹

**C. Direct Suppression of Public Broadcaster Speech
Cannot Be Justified As Designed To Prevent Indirect Efforts To Influence Such Speech**

The Government also suggests that Section 399 serves a compelling interest by protecting public broadcasters from reductions in funding as punishment for critical editorializing and by protecting them from Congressional pressure that would jeopardize their objectivity. Brief at 34-35, 38. Congress determined, the Government argues, that only by banning editorial speech could it ensure that the Government would not interfere with the objectivity of noncommercial broadcasting. Brief at 35, 38.

The simplest answer to the Government's argument is that, if the Government wants to avoid pressure on non-

Court held that the First Amendment did not prohibit the State from requiring the owner of a shopping center to allow petitioning activity on his center because the views expressed by pamphleteers or petitioners would "not likely be identified with those of the owner." *Id.* at 87.

In *Wooley*, the Court indicated that the national motto "In God We Trust" on United States currency would pose a different case than New Hampshire's license plate since carrying currency in one's pocket would not associate the motto with its carrier. 430 U.S. at 717 n.15.

⁵¹ "[E]very appropriation made by Congress uses public money in a manner to which some taxpayers object." *Buckley v. Valeo*, 424 U.S. at 91-92.

commercial broadcasters, it has full control over its own conduct. It need not violate the First Amendment (by suppressing all editorial speech) in order to keep itself from attempting to influence the content of editorial speech. It need only exercise self-restraint. The First Amendment requires the exercise of such "less drastic means." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).⁵²

Other possible "less drastic means" have already been adopted. The Government seems to forget that Congress has already prohibited any attempt at governmental influence or control of public broadcasters by barring

any department, agency, officer, or employee of the United States [from exercising] any direction, supervision, or control over public [broadcasting], or over the Corporation or any of its grantees or contractors

47 U.S.C. § 398(a). And Congress has already provided significant insulating protection against attempts at governmental pressure on public broadcasters. *Id.* § 396.

If these measures were deemed insufficient, additional insulating measures rather than the outright suppression of speech could be adopted. A more specific statute making it a criminal offense for Congressmen or other government officials to attempt to influence the content of public broadcasting editorials is one alternative. See similar state statutes cited in Government's Brief at 37 n.67.

In any event, as the District Court found,⁵³ the fear of station submission to governmental control or pressure

⁵² To the extent that the Government argues that suppression of editorial speech is necessary to achieve fair or balanced programming, it is clear that the suppression of speech is not a permissible remedy for the perceived evil. *Brown v. Hartlage*, 456 U.S. at 61. Indeed, even the Fairness Doctrine has been sustained as constitutional only because it "contemplates a wide range of licensee discretion." *FCC v. Mid-West Video Corp.*, 440 U.S. 689, 705 n.14 (1979); see *Red Lion Broadcasting Co. v. FCC*.

⁵³ 547 F. Supp. at 387.

is too speculative to sustain Section 399's sweeping First Amendment infringement. Preventing public broadcasting stations from using private funds to editorialize about potholes in Chicago or the problem of low level radiation is hardly necessary to protect against efforts to influence editorials critical of the federal government.⁵⁴ The public should not be deprived of all editorial speech in order to avoid speculative licensee temptation to succumb to governmental pressure.

The Government's reliance on the speculative fear of improper governmental influence over public broadcasters is quite ironic in view of the fact that Section 399 appears to embody the very evil (Government interference with undesired broadcaster speech) the Government seeks to avoid. There are numerous indications in the legislative history that Section 399 was designed to suppress critical speech by public broadcasters.⁵⁵ Congressmen supporting passage of the legislation expressed concerns

⁵⁴ A review of recent editorials by local CBS stations reveals the great variety in type and subject matter of broadcast editorials. Many of these are unlikely to be of any conceivable interest to any federal official. In a recent two-week period editorials ranged from localized concerns such as fixing potholes and a proposal for a four-day school week in the Chicago area (WBBM-TV), and the revitalization of the South Bronx (WCBS-AM) to more national concerns such as the problem of low level radioactive wastes (WBBM-TV), this Court's abortion decisions (KMOX St. Louis), no fault divorce (WBBM-TV), and the job market for the handicapped (WCAU-AM Philadelphia).

⁵⁵ This Court has just recently noted that statutes based on "any impermissible or censorial motive on the part of the legislature" cannot withstand First Amendment scrutiny. *Minneapolis Star & Tribune*, 103 S. Ct. 1365, 1369 (1983). See also *Board of Education v. Pico*, 102 S. Ct. 2799, 2810 (1982) (plurality opinion); *id.* at 2813, 2814 (Blackmun, J., concurring in part); *Metromedia, Inc. v. San Diego*, 453 U.S. at 566 (Burger, C.J., dissenting) (finding no danger that anti-billboard ordinance was a "mask for promoting or deterring any viewpoint or issue of public debate").

that they had "been editorialized against"⁵⁶ and fears that public broadcasting would editorialize on controversial subjects such as home rule for the District of Columbia, fluoridation, and the President's Vietnam War policy.⁵⁷ Given this legislative history, it is all the more clear that the interest of "assuring objectivity" in the

⁵⁶ See *Hearings on H.R. 6736 and S. 1160 Before House Committee on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 641 (remarks of Rep. Springer) ("There are some of us who have very strong feelings because they have been editorialized against."); 113 Cong. Rec. 26391 (1967) (remarks of Rep. Keith) ("It is conceivable that [a certain noncommercial television broadcast] could . . . have adversely affected my candidacy for reelection."); *id.* (remarks of Rep. Joelson) ("Those of us in public office are in a position where newspapers, radio, or TV stations can say anything they wish about us. . . . Therefore, the right of editorializing should be very, very carefully scrutinized."); *House Hearings on H.R. 6736 and S. 1160*, at 389 ("Yes, I have been subjected to editorializing.") (remarks of Rep. Moss); see also *id.* at 415-16. Senator Thurmond in criticizing the Senate version of the bill without the editorial ban warned, "Those who vote for this bill are voting for something that has a vast potential to be used against them." 113 Cong. Rec. 12,992 (1967).

⁵⁷ *House Hearings on H.R. 6736 and S. 1160*, at 307 (remarks of Rep. McCormack) (fluoridation); *id.* at 391 (remarks of Rep. Springer) (home rule); *id.* at 439 (remarks of Rep. Kuykendall) ("One man's idea of a completely unbiased editorial may be completely biased to another man. This is something that is troubling some of us."); *id.* at 596 (remarks of Rep. Macdonald) (editors might take "very strong positions about a controversial subject" or criticize the President's war policy).

The "legislative history is replete with troubling statements." *Community-Service Broadcasting*, 593 F.2d at 1128 n.25 (Robinson, J., concurring in the result). See Lindsey, *Public Broadcasting: Editorial Restraints and The First Amendment*, 28 Fed. Com. B.J. 63, 81 (1975); Toohey, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 Educ. Broadcasting Rev. 31, 34 (1972) ("[T]he purpose of Section 399 was clear: to prevent Congress from creating a monster that might someday turn on its creator. Therefore, to achieve its own self-protective ends Congress simply legislated away a significant part of educational broadcasters' right of free speech.").

face of Congressional pressure will not support the statute.⁵⁸

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

Of Counsel:

ALLEN Y. SHAKLAN
HOWARD F. JAECKEL
CBS INC.
51 W. 52 Street
New York, New York 10019

J. ROGER WOLLENBERG
TIMOTHY B. DYK *
ALAN S. TENENBAUM
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for CBS Inc.

ERWIN G. KRASNOW
WILLIAM E. KENNARD
1771 N Street, N.W.
Washington, D.C. 20036

*Counsel for National Association
of Broadcasters*

J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036

*Counsel for Radio Television
News Directors Association*

* Counsel of Record

September 12, 1983

⁵⁸ Section 399 also provides that

No noncommercial educational broadcasting station may support or oppose any candidate for political office.

47 U.S.C. § 399. Although Amici believe that this restriction on political endorsements is unconstitutional, Appellees have not challenged this part of Section 399. This Court therefore need not reach the question of the constitutionality of a ban on public broadcaster involvement in partisan elections. Cf. *First National Bank v. Bellotti*, 435 U.S. at 788 n.26 (not reaching question of whether Congress could restrict corporate participation in political campaigns for election to public office).